THE PROSECUTOR'S MANUAL
CHAPTER 10
DIRECT EXAMINATIONS

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I. INTRODUCTION

The direct examination is the presentation of the witnesses to the jury. This presentation is similar to introducing one's prospective life partner to one's parents and is of vital importance to the success of the case.

II. PURPOSE OF DIRECT EXAMINATION

A. Primary Purpose - Establish Elements

The primary purpose of direct examination is to elicit information from the state's witnesses and get exhibits admitted which will establish the elements of the crime beyond a reasonable doubt.

B. Secondary Purpose - Protection

The secondary purpose of direct is to "orchestrate" your examination in such a way that the jurors are interested and receptive to what your witnesses say and the evidence you offer.

III. PREPARATION FOR DIRECT EXAMINATION

A. Marshall the Facts

Prepare for direct examination by carefully reading the entire case and inspecting all exhibits. Discuss the case with and question all witnesses you intend to call to the stand. The old adage that you should not ask a question to which you don't know the answer originated with an attorney who got burned because he had not prepared for direct examination.

B. Prepare Legal Memoranda

The prosecutor must prepare legal memoranda to answer all anticipated adversary objections to the admission of evidence on direct and redirect examination, and to abort improper defense tactics. Experienced prosecutors have found that they almost always win arguments over the admissibility of evidence when a trial memo is submitted. It is further the experience of most prosecutors that they lose the "close questions" when no memo is prepared.

1. Protection of the Record

Most beginning prosecutors do not realize that judges must maintain "stat's" too. A judge who is constantly reversed on appeal (especially because of "dumb" mistakes) loses respect in the legal community, especially among his colleagues. For that reason judges jealously seek to "protect their record" from reversible error.

a. The prosecutor's function in protecting the record

Many prosecutors believe that their job is to get the defendant convicted by any means possible and let someone else worry about the appeal. Trial judges do not appreciate this attitude. A prosecutor who conveys to the court his sincere desire to "keep the record clean" will soon find the court resolving doubts in his favor. By far, the best vehicle to convey this attitude is through the presentation of a concise legal memo supporting your position.

b. Predispositions of trial judges

It seems to prosecutors that many trial judges are predisposed to rule against the state on close issues. The rationale advanced for this predisposition is one of safety. If a judge rules against the state during a trial there is a slight chance of appeal (and thus reversal) i.e. if the state wins, it won't appeal (cross-appeal); if it loses it can't appeal (double jeopardy). If the court rules against the defense on a close issue, the defense will surely appeal if a conviction is obtained.

Several points should be made here.

(1) If there is a serious question regarding the admissibility of evidence which you believe will be raised at trial, make a motion to have its admissibility determined several days before trial.

a) If the defense won't object and you believe, based upon the law, that the evidence is admissible don't raise the issue by motion.

b) If the court rules against you, take the issue to the Court of Appeals.

(2) Most prosecutors who have taken the questions "upstairs" and won have found that the trial judges are much more likely to consider the state's arguments in future confrontations.

c. Defense Predispositions

(l) Protecting the Record

Defense attorneys are rarely interested in "protecting the record." In fact, many will have no regrets if the case is riddled with error.

(2) Trial Memos

A defense attorney will seldom prepare a trial memo. Your preparation of one will therefore give your argument an even more professional and credible dimension.

2. Give Your Memo to the Judge Prior to Trial

Unless the memo is short and obviously dispositive you should give the judge your memorandum prior to trial. The judge will appreciate the opportunity to be prepared in advance for the problem.

3. Never Misstate the Facts or Law

The fastest way to lose credibility with a trial court is misstate the facts or law.

C. Questions You'll Ask Witnesses

1. Write out your Questions

It is important that the beginning prosecutor write out every word of every question he will ask each witness. This will help you greatly in organizing your case. Further, when you write out all of your questions most of the problems and pitfalls of your case will jump off the page at you.

2. Write out their Answers

It is just as important then to write out every answer you expect your witnesses to give. If during preparation your witness gives a particularly good answer to your question, tell him that you like that answer and to remember it when he testifies. Star the questions and answers that represent elements so they will stand out.

Know your questions and answers so well that you do not have to refer to your questions. This may be the most important aspect of direct examination. Jurors will be more impressed by your organization and competence. Even more importantly, if you do not know all the questions and answers you will tend to read your questions and miss the answers given. Reading your questions will appear less professional and more stilted to the jury. Missing answers will cause you to lose vital evidence and the jury to become confused.

IV. MECHANICS OF DIRECT EXAMINATION

A. Demeanor and Projection

The prosecutor's demeanor, projection and court presence is an art. An appropriate analogy may be drawn to the conduction of a symphony with the lawyer acting the part of the conductor, the witness acting as the orchestra and the jury the audience. The effective lawyer, like the conductor, must achieve the seemingly contradictory goals of:

1. Making the Jurors Hardly Aware of his Presence

It is very important that the jurors hear important evidence from the witness. A prosecutor who constantly interrupts or asks a lot of leading questions is like a conductor who, dissatisfied with his violinist, takes the violin and begins to play it himself.

2. Giving the Jurors the Impression that the Prosecutor is in Total Control of the Courtroom

The best prosecutors, like the best conductors, command the uninterrupted attention of the judge, jury and defense attorney (except for a few overruled objections which inure to the benefit of the state). The following are suggestions which should aid you in effecting this control.

a. The Skill is an Art Form

Think of the skill as a form of art which can only be developed by practice. Observe the trials of those attorneys whom you respect with an eye toward emulation of effective techniques. Ask good attorneys to sit in on your trials. Tell them you would appreciate objective criticism.

b. The Advantages of Standing

Although opinions vary, many good attorneys feel that they are more in control of the courtroom when they are standing.

(1) The Person Who is Standing "Has The Floor"

To most people (including presumably the jurors) a person who is standing "has the floor" and relinquishes it only when he pleases.

(2) Walking Around

Standing also puts the prosecutor in the unique position of exercising the option of moving around the courtroom at his whim. If you use this option wisely you can further exercise your control. For example, if, during particularly important testimony, you want your witness to look at jury panel simply walk over behind the jury box. Your witness' eyes and even body will rotate with your movement. The witness will then appear to be speaking directly to the jurors.

c. Disadvantages of standing

Most beginning prosecutors feel uncomfortable when they stand or walk around the courtroom. This inexperience and discomfort is inferentially perceived by the jurors and results in a negative impression. The following may help create a better impression and ease discomfort.

1) Stand erect and clasp your hands in front of or behind your back when asking questions.

2) Avoid moving around when you ask a question or when the witness is answering.

3) Never slump over counsel table to look at your questions.

4) Plan when and where you will walk around as much as possible so that your wanderings do not appear aimless.

d. Expressions

Your expressions or lack thereof are important too. Make your expressions work for instead of against you.

(1) Ethical Considerations

Expressions such as giggling, moaning, and sighing to distract are usually not only inappropriate but also unethical. *State v. Gallegos,* 99 Ariz. 168, 407 P.2d 752 (1965); ABA Canons of Professional Ethics, Canon 17. Most experienced attorneys move to have opposing counsel admonished or held in contempt when opposing counsel conducts himself unprofessionally in front of the jury.

(2) Serious Overtones

Most jurors are predisposed to seriousness at the beginning of most trials. Defense attorneys know that by interjecting levity into the proceedings jurors will often consider the defendant's conduct much less serious than it was.

Prosecutors who by their actions do not constantly remind the jury of this seriousness aggravate the problem. For this reason most beginning prosecutors are well advised to avoid levity in the prosecution of felony cases.

(3) Surprise Answers

No matter how well prepared you are you will be surprised by some answers given by your witnesses. If your witness gives an answer which hurts your case, never show surprise unless your witness has obviously turned hostile to the state. If you don't react, the answer might go right over the juror's heads.

Unless you are certain why the witness gave the surprise answer (such as a misunderstanding of the question) you are better off dropping the subject. After about five minutes take a recess, discuss the issue with the witness and figure out how to straighten it out for the jury.

e. Speak Clearly with Confidence and Authority

The vast majority of beginning prosecutors feel very uncomfortable their first few times in trial. This discomfort is usually reflected not only in the prosecutor's demeanor but also in his speech patterns. Prosecutors who speak too low or constantly lose their train of thought because of nervousness will lose the jury's confidence. Even worse is the tactic of overcompensating by speaking very loud or swaggering about the courtroom like a fool.

As most jurors have no idea of what is going on in Court they will identify with and believe the attorney who is the most confident, authoritative and experienced. Your authority will be tested during direct examination by defense counsel, for example, through objections (See *infra*). Your ability to handle objections with confidence will greatly enhance your control.

f. Demeanor Toward the Witnesses

Always treat the witnesses the way you want the jury to view them.

(1) Your "Good" Witnesses

If your witness is a good witness (honest, no priors, not an accomplice, etc.), try to convey to the jury an attitude of respect, (even deference, if your witness is an expert). An example of a particularly effective way of conveying this attitude, used by some prosecutors, is to tell the bailiff that you will open the courtroom door for your rape victim or other important witness(es) (assuming "the rule" has been invoked). After opening the door show her the way to the witness stand. Conduct such as this serves the dual function of showing the jury that you are in control and that you respect the witness.

(2) "Bad Witness" (Accomplices, Etc.)

Your demeanor when dealing with "bad witnesses", such as accomplices, is absolutely crucial.

a) Preparation of Jury

If you have prepared the jury in your voir dire and opening about your bad witness you will often find the jury surprisingly receptive to the witness' testimony. They may not believe everything he says, but they will believe everything you say later in closing because you have been honest and straightforward with them.

b) Control of Bad Witnesses

If you have not established "control" of your "bad" witnesses long before the trial starts you will never control him at trial (see Trial Preparation Chapter).

At trial you should in most instances convey to the jury the impression that you are dealing at arms-length with the witness. With some of these witnesses (e.g. those who have lied and will lie at trial) you may want to show your disdain.

g. Avoid Open-Ended Questions

Open-ended questions like, "What happened there that night?" turn the pace and control of the courtroom over to the witness. Further, the witness is then unfairly required to organize and present a series of events in a stress situation. Beginning prosecutors should realize that asking

open-ended questions creates surprise answers and poor witnesses.

B. Form of Questions

Communication is the attorney's medium; language is the basic tool. The essential task, then, for every prosecutor is to learn how to use language to communicate most effectively with the jury. Very important in this process is learning how to (and not to) ask questions.

1. Initial Questions of the Witness

a. Building up the Witness

The direct examination should begin with an identification of the witness. It should bring out his name, occupation, residence, status (marital and family) and position (social and professional) in the community. These introductory questions tend to build up the witness in the eyes of the jury. The introductory part of the direct examination should be used not only to let the jury identify with the witness as a human being but also to enhance his credibility. Therefore, when examining a police officer on direct, the jury should be given some information about the witness' background, experience and training.

b. Reducing Tension

The introductory part of the direct examination can serve another significant purpose. It can reduce the nervous trauma which each witness who testifies in court experiences. This can have a bearing on demeanor which in turn can be a silent factor in the jury's favorable appraisal of credibility and trial testimony. To give the witness the maximum opportunity to calm down and to give assurance, the preliminary portion of the examination should be conducted in a deliberate manner. Ask simple questions and lead the witness a little if appropriate.

2. Leading Questions

a. The Over Use of Leading Questions Not Only Hurts Your Case but Is Also Subject to Objection.

In conducting the direct examination the prosecutor should let the witness testify and avoid leading him as much as possible. See Rules of Evidence, Rule 611(c). Many lawyers have the unfortunate habit of conducting a direct examination by stating a fact and letting the witness merely acquiesce. Declarations by counsel and one-word responses -- "yes" or "no" -- by the witness detract greatly from the witness.' credibility. The jury is not likely to trust the witness or to be persuaded with the truth of his testimony if the witness merely appears to mechanically concur in the prosecutor's declarations which are disguised as questions. Furthermore, valid objections by defense counsel, if sustained, can often disrupt what would have otherwise been an effective direct examination.

b. Permissible Use of Leading Questions

Leading questions are permissible in the court's discretion when:

1) they relate to undisputed introductory matters.

2) the subject matter is of a delicate or embarrassing nature and precise responses are desirable.

3) the witness is immature, aged, mentally infirm, under an emotional disability, or where the testimony is elicited as specific rebuttal.

4) the witness appears to have exhausted his memory on a particular subject.

5) the testimony pertains to complex transactions which no ordinary person could be expected to memorize.

6) necessary to cue in a witness to a significant detail of his expected testimony which has been inadvertently omitted.

7) the witness is hostile, unwilling or biased.

3. Compound Questions

Compound questions confuse the witness and jurors and invite both sustainable objections and ambiguous answers. Prepare short, simple questions and stay with them.

4. Negatives

Avoid negatives in your questions. Questions like, "you did not give him permission, did you?" or "I take it you did not have any part in that; isn't that correct?" are confusing and invite ambiguous answers and sustainable objections.

5. Open-ended questions

6. Words to (and not to) Use

a. Theme and "Buzz" words

You should have "set up" your jury with certain theme or buzz words in your opening statement which the jurors will, be prepared to hear from the witness(es) in direct examination, closing argument and, possibly, in jury instructions.

b. Statutory language

Questions and answers which contain statutory or jury instruction language, e.g. "entry," "coercion," "penetration."

c. Making Witnesses Leave a Proper Impression Upon the Jury.

If the jury accepts you as a proper authority figure your attitude toward and words used when questioning witnesses will have an effect upon the jury. Consistent with this, always try to use words which build a close deferential relationship between the jury and your witness. Address your witnesses by his name or Mister, Doctor, Detective, etc. Just as you never call a defendant by his name, you should always call your own witness by his name.

d. Technical Words and Jargon

Avoid the unnecessary use of technical terminology and jargon in your questions and try to get your witnesses to avoid them in their answers. If a witness uses words not commonly understood you must ask the witness to explain the words. The jury will appreciate your consideration in making the evidence clearer to them.

C. Listen to the Answer the Witness Gives

Other than failure to properly prepare, the most common error committed by beginning prosecutors is the asking of questions in a rote manner totally oblivious to the answers the witness gives.

1. Catch the Ball Before You Run With It

Oftentimes, prosecutors concentrate so hard on the next question that we fail to listen carefully to the answer to the one we just asked. This is analogous to a split-end in football starting for the goal line before he really has the ball in tow, and it results in the same thing -- fumbles. Listen to the answer to each of your questions.

a. It may not be responsive. It may be clear to you but ambiguous or misleading to the jury. If so, clean it up.

b. The witness may have misunderstood the question. If so, straighten him out.

c. Worst of all, the answer may not be the one you expected. If so, get your mind in gear and figure out what's going on as soon as possible. Is the witness mistaken, confused, or changing his testimony?

2. Instant Replays

Replay the answer in your head. Is it "good enough," or can it be made better? Should you hammer it in or prop it up? Does it give you any new insights or ideas? Can it be misconstrued later by the defense attorney in argument or on appeal? If so, shore it up.

3. Awareness

At first blush, it might appear that this is an impossible task. How in the world can you do all of this between questions? All I can tell you is that after a while, it becomes second nature, like a singer hitting a true note - it just happens. All it takes to get it started is an awareness of the principles; the rest will come by itself with practice.

D. Drawing the Sting

1. "Firstest with the Mostest"

If you have weak, harmful or bad points in your case, which you are certain will be raised by the defense, it is almost always to your advantage to work them in on direct in order to disarm the defense before it has a chance to attack. If the jury first hears about such damaging matters from you,
you can create a context in which they will be brought out. Under this type of control you can minimize their potential for dramatic impact by couching them in a sterile setting and cushioning them with an appropriate explanation. This takes the play away from your opponent. Examples of such materials are prior convictions, grants of immunity or leniency, rewards, previous mistakes, inconsistencies in testimony, etc.

2. Standard Defense Questions - The Sting

Many successful attorneys make it a practice to cover virtually all the standard defense questions. For example, if the officer is going to testify in a trial that the defendant's speech on the evening in

question was slurred, he should also bring out the fact that the officer had never heard him speak before, and does not know his usual manner of speaking. Along the same line, be certain to inform your witness that you intend to bring out facts favorable to the defendant. This goes a long way toward establishing both your and the witness' credibility and integrity with the jury, and leaves the defense nothing to do but go over ground you have already covered.

3. Disadvantages

On the other hand, there is such a thing as unnecessarily cutting up your own case. Carried to the extreme, the "everything out-front ploy" can get out of hand or reinforce the defendant's position.

4. Discrepancies

Be alert for any discrepancies between the police reports, statements, etc., and the testimony that will be given. If you don't talk to your witness, you may find yourself in an embarrassing situation. Even trivial errors made by an officer in writing this report should be explained on direct. You can do it with a ho-hum attitude and eliminate most, if not all, of the impact the defense can create by covering it on cross.

5. Bad Witnesses

If the witness has been convicted previously, is testifying inconsistently, or is an accomplice who has pleaded guilty or received immunity, the prosecution should not allow information so damaging to the witness' credibility to be first established on cross-examination. Frequently defense counsel and some courts misconceive this tactic as impeachment by the prosecution of its own witness which is generally impermissible. This is permissible; Rule 607; *State v. Robinson*, 165 Ariz. 51, 58, 796 P.2d 853, 861 (1990); *State v. Duffy*, 124 Ariz. 267, 603 P.2d 538 (App. 1979). The prosecutor should prepare a brief memo of law to counteract an anticipated objection to the admissibility of evidence at trial.

E. Taking Notes

1. Don't Do It

Generally, it is a mistake to take notes during direct examination. If you have properly prepared your case there will be no reason to take notes. Besides, taking notes negatively distracts the jury and keeps you from listening to the witness' answers. In the unusual case where note taking is necessary, get your investigator to take the notes for you.

2. Exception

An exception to this rule might arise when your witness says something striking which is favorable to your case. By taking a moment to sit down and note the answer (and possibly telling the court reporter to note it) you will impress upon the jury the importance of the answer and give it time to be absorbed and written down by the jurors.

3. Mental Notes

Jurors tend to write down what they think is important. Whether or not you think the issue is important you must be prepared to argue it in closing. Therefore, if you see jurors making notes after an answer be sure to make a mental note of this and write it down after direct examination.

F. Foundational Questions

Seldom is a prosecutor more embarrassed or a jury more disconcerted than when the state cannot lay the proper foundation for the admission of evidence. Sustained objections on foundational grounds will encourage the jury to suspect your competence. Even worse, if you do not get your evidence admitted because of foundational problems you can seriously jeopardize the strength of your case. For example, in a robbery—case your witness wrote down the out-of-state license number of the getaway car. At trial the defense attorney objects to a certified copy of ownership because the document is not cross-certified. What do you do to lay a proper foundation?

Most foundational problems can be easily solved by proper preparation and seeking the advice of more experienced attorneys in your office. Another good source of proper foundational questions is National District Attorneys Association Manual entitled "Predicate Questions" which has been distributed to all county attorneys.

G. Effect of Direct Examination Upon Closing

Every experienced prosecutor knows the importance of direct in setting up closing argument. If the right questions are not asked and the right answers given, important comments are precluded in closing argument.

Examples are legion; one might be the elicitation of the feelings of a victim during the perpetration of the crime (especially relevant in crimes of violence). Later in closing when the defense attorney argues the effect of the jury's verdict upon the defendant (as most defense attorney's do as a matter course):

> "Your decision here today is an important one which will have a lasting effect on Billy (the defendant). As you make your decision think whether a year from now you'll be able to look yourself in the mirror and say you made the right decision. Remember Billy's life and liberty are at stake, etc., etc., ad nauseum."

The prosecutor can respond:

> "Defense counsel told you that the defendant will have to live with your decision. That's true. However, he didn't tell you that Mrs. Smith is going to have to live with the defendant's decision to rob (rape, burglarize, etc.) her. That invasion will remain with her forever. You heard the testimony--how she felt, etc., etc."

H. Handling Objections

One of the most demanding situations for the beginning prosecutor is how to respond to a defense objection.

1. Pause

a. Give Yourself a Moment to Formulate Your Answer

The beginning prosecutor should avoid blurting out a response. Calmly pause for a moment (possibly looking irritated by the interruption) and formulate a concise and confident response in your mind.

b. Give the Judge a Moment to Rule

The judge will usually rule on the objection without requesting response. If the judge overrules the objection, thank him to let the jury know you won. If he sustains the objection and you do not know why or you have a reason- why the objection should be overruled, ask the judge if you may be heard or be allowed to approach the bench.

c. The Judge May Look at You or Seek a Response

If you have a "winning" response which you can deliver with authority, do so. If you do not, ask to approach the bench and let the damage be done outside the hearing of the jury, or just withdraw the question.

2. The Attorney Who Testifies During Objections Must Be Shut Up

A defense attorney who makes statements in the presence of the jury while objecting can destroy your case.

The first time defense counsel does this, you must counter immediately. Usually it is best to approach the bench, request that the judge admonish the defense attorney to cease and desist from such conduct and inform the jury that the defense attorney's conduct was improper and to disregard what the defense attorney said. If the judge admonishes the attorney and the attorney "testifies" again, ask the judge to hold the attorney in contempt.

I. Identification of the Defendant

In many cases the identification of the defendant is a very important aspect of direct examination.

1. When to Have the Defendant Identified

Most prosecutors try to get the defendant identified as soon as possible so that the jury associates the defendant with the crime right away.

2. How to Have the Defendant Identified

Q: Do you see that person in the courtroom?

A: Yes I do.

Q: Would you point him out?

A: Indicating

Q: Would you describe him please?

A: He has long blonde hair, a mustache and a red shirt.

Prosecutor: May the record reflect your Honor, that the witness has identified the defendant.

Judge: The record may so show.

3. Identification of the Werewolf

Often the competent defense attorney will, by the time of trial, change the appearance of his client from that of a ghoulish werewolf to that of a mild mannered clerk.

To counter this, be sure to have the witness and the arresting officer identify a picture of the defendant when he was arrested. This tactic provides great fodder for closing also.

V. ORDER AND TIMING OF WITNESSES

Initially, your best method of procedure is to order your witnesses so that they will testify in chronological or the most logical order possible. Once you have established an order let your witnesses know the order of their presentation and avoid, like the plague, juggling your order for the personal convenience of the witness(es). Calling witnesses "out of order" causes confusion. It is far better, for example, to call the witness' employer and explain the problem to him than to let scheduling problems ruin your case.

A. The First Witness

Begin your case with a strong witness who can fulfill the promises in your opening statement. The strong witness need not be the most articulate or smartest. He or she should be a person who can at least confirm details of the first part of the "story" you told the jury in opening statement.

1. The fury attention span

An important consideration is that a jury's attention span is greatest during the first witness. Also, this witness will leave an impression which will remain with the jury the rest of the trial.

2. Cross-examination

Another important consideration in choosing your first witness is that defense attorneys usually cross-examine the first witness more thoroughly in order to make a good initial impression upon the jury and lay the foundation for possible later inconsistent testimony by subsequent witnesses.

B. Witnesses Who Can Provide Only Cumulative or Superfluous Testimony

1. The Quandry

Whether to call a witness who can provide little besides cumulative or superfluous testimony is often a quandry. Experienced prosecutors almost always exercise their judgment in favor of not calling the witness.

2. Reasons Not to Call

Generally if one witness establishes a fact, it is unnecessary to call another witness to reiterate or corroborate that testimony. Furthermore, you are entitled to jury instruction that neither party needs to call all witnesses to an event. Almost without exception, one witness' version of an exciting event' will vary from another witness. Such discrepancies may disturb a jury and must be later argued away. If the witnesses testify alike, the state's case is subject to assertions of collusion by the defense. When you do not intend to call witnesses whose testimony would be cumulative, be sure to have the witness(es) which you do call demonstrate that fact. The defense attorney is likely to argue that your failure to call all witnesses implies withholding evidence adverse to the state's case. This argument, however, can be easily neutralized by arguing that if the defense felt the witness

was important he could have called the witness himself. This argument can be further bolstered by the jury instruction referred to above.

3. Reasons to Call

a. Surprise Testimony

If, to your surprise, your principle witness does not, or can not, testify to a necessary fact, you may have to call a second or third witness. You should therefore consider issuing a subpoena to all "cumulative" witnesses so they will be ready to testify. (Proper preparation should avoid this problem).

b. Critical Issues

Where the cumulative testimony goes to the heart of the trial, e.g. identification of the defendant in a robbery trial, do not hesitate to call the witness to the stand.

C. The "Bad" Witness

1. Preparing the Jury

If you have prepared the jury for this witness in your voir dire and opening, and "keep your distance" from these witnesses, they are unlikely to hurt you and may help you a great deal.

2. "Sandwich" Bad Witnesses

If at all possible, "bad" witnesses should be "sandwiched" between "good" witnesses and never placed at the end of the day.

D. Rebuttal Witnesses

Whether to "save" a witness for rebuttal is a question which must be left to the good judgment of the prosecutor. Because the Criminal Rules require disclosure of your rebuttal witnesses you will seldom be in position to surprise the defense. You will, however, want to consider holding back certain evidence for tactical reasons, such as, to avoid "opening the door" or offering a defense which the defendant would otherwise have to take the stand to present. For example, if your case is strong you might want to avoid offering the defendant's statement if it contains any exculpatory comments which support the defense in the case. By so doing you force the defendant to take the stand to tell the story subject to your cross-examination and his impeaching statement. This is an especially good tactic if the defendant has a prior conviction, but is usually ineffective if the defendant has a witness who can tell his story for him.

VI. EXHIBITS

A. Importance of Using Exhibits

1. Studies have shown a person retains information he has seen 506 times better than that which he has heard.

2. Jurors are more impressed by physical evidence and tend to think of it as stronger than testimonial.

3. Jurors will maintain a higher interest and attention level.

4. Jurors will get a better feel for your case.

5. Defense attorneys seldom present exhibits. Therefore, a prosecutor is given a legitimate vehicle to "one-up" the defense attorney and appear more competent to the jury.

B. Preparation

1. Personally Examine All Existing Exhibits

a. Try to get the witness to accompany you to the law enforcement agency to look at the exhibits.

b. Make sure that the witnesses can identify the property and find out how.

c. Determine how your chain of custody will be established on "fungible" property (e.g. narcotics).

d. Carefully compare the evidence with descriptions in the police reports, statements, indictment etc. with the actual property (e.g. serial numbers).

e. Personally look over all evidence in the defendant's possession when he was arrested. You'll be surprised how often it will reveal information which will tie the defendant to the crime.

f. If property has been released to the victim be sure that the property has been photographed and that the victim is told to hold onto the property until trial.

2. Create New Exhibits and Improve Old Ones

a. New Exhibits

New exhibits can easily be created for trial. For example, diagrams showing the house or area where the offense occurred can be used in almost every case and are impressive and helpful to the jury. Chronological time charts or witness charts can also be invaluable in some cases.

b. Improvement of Exhibits

Many exhibits in their original condition are unimpressive and ineffective. Consider improvement of these exhibits. For example, if a particular picture is important have it blown up so that all the jurors can see it as the witness explains it. Alternatively, copies of the pictures can be
made to give each juror. Another example is the distribution of a transcribed statement of the defendant for the jury to read as the taped statement is being played.

3. Documents - Best Evidence

If documents are to be introduced, is it the original or cross certified if necessary?

4. Expert Opinions

Beginning prosecutors are reluctant to use experts to analyze and testify about exhibits. This is a mistake. If an exhibit can be explained by an expert, use him rather than a lay witness.

5. At Trial

a. Know the foundational questions for getting the exhibit into evidence. For example, in introducing transcriptions of a defendant's statement you should not only have "disclosed" the transcription but also make sure your officer is prepared to testify that he has listened to the tape while reading the transcription and that the transcription accurately reflects what the tape relates.

b. Make sure you know exactly when and how you will present each exhibit to the witness. For example, exhibits which may prejudice the jury (such as guns and knives) cannot be viewed by the jury until admitted into evidence. Failure to conceal these exhibits during the identification process is improper.

c. After you ask the court to admit the exhibit, show it to the defense attorney for inspection.

d. After an exhibit is admitted, pass it around the jury. If at all possible, do not ask questions while jurors are looking at the exhibit.

e. Make up an exhibit list and check off each exhibit after it is introduced and while the jury is inspecting it.

f. Be sure that you refer to each exhibit by number when you question a witness. This is an important part of "making your record" and makes you appear more professional to the court and jury.

g. Avoid standing between the jurors and the witness, and do not allow the witness to stand between the jurors and demonstrative evidence e.g. charts, diagrams, maps, etc.

VII. "THE STATE RESTS"

A. Before Resting

At the conclusion of the presentation of your evidence, take a look back through your questions to make sure you've proved all of the elements and check your exhibits to ensure that all of your exhibits have been admitted. If you have any doubts as to whether any of your exhibits were admitted, move the court to admit in evidence all exhibits marked and presented by the state.

B. After Resting

After resting, do not relax and rest on your laurels. For at that time the defense attorney will move for a judgment of acquittal. If there is any question on this issue be sure that you have prepared a

trial memo. Also, pay close attention to the defense attorney's argument to the court. He'll probably be making many of the same points in his final argument to the jury.